

a **SHUAIB LAZIM, RE: EX P; MERCANTILE INSURANCE SDN. BHD.**

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[BANKRUPTCY NO. D3-29-7415-89]
8 JUNE 1990

b **BANKRUPTCY:** *Receiving order and adjudication order made against debtor pursuant to a default judgment - Debtor absent when adjudged bankrupt - Bankrupt nominated as candidate for by-election - Bankrupt declared as a precondition for election that he was not an undischarged bankrupt - Upon close of nomination, bankrupt's opponent raised objection to his candidature on the ground that he was an undischarged bankrupt - Bankrupt sought declaration that receiving order and adjudication order be deemed null and void - Order 15 r. 16 Rules of the High Court 1980 - Declaration also sought for said orders to be rescinded and annulled respectively - Whether bankrupt ought not to have been adjudged a bankrupt - Section 105(1), (5) Bankruptcy Act 1967*

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d On 2 August 1988 default judgment was entered against the debtor Encik Shuaib for RM450,000, interest and costs. On 21 February 1990, Encik Shuaib was adjudged a bankrupt when he was absent in open Court. On 12 March 1990, Encik Shuaib was nominated as a candidate for the by-election. He declared that he was not an undischarged bankrupt. On nomination day, after nomination had closed, the opposition candidate who stood against Encik Shuaib raised an objection to his candidature on the ground that he was an undischarged bankrupt. On 15 March 1990, Encik Shuaib by a notice of motion sought a declaration that the receiving order and the adjudication order made on 21 February 1990 against him be rescinded and annulled respectively.

e His ground was that he "ought not to have been adjudged a bankrupt as agreement for settlement as to liability had already been concluded before 21 February 1990", and because of this settlement, the petitioner was to have had the petition withdrawn.

Held:

f [1] The lack of objection on the part of other parties to the proceedings or even their consent to the orders are of no relevance. However, the Court would normally exercise its powers in favour of the applicant and grant the relief sought if the applicant was entitled to the right and it would not be unlawful or unconstitutional or inequitable for the Court to grant it.

g [2] In this case, since the petitioner and the Official Assignee did not oppose the application and that since the opinion of the Court was not sought on the probative value of the assertions the receiving order and the adjudication order made on 21 February 1990 were rescinded and annulled respectively. Section 105 of the Bankruptcy Act 1967 which gives the Court the power to make the orders also provides that such power should be exercised where the Court was satisfied that the debtor ought not to have been adjudged bankrupt.

h [3] A declaration of right is not needed to make such orders of rescission and annulment prescribed by s. 105 of the Bankruptcy Act 1967. In the context, there was no call for the Court to declare the orders made on 21 February 1990 as null and void and that prayer was refused as it was not relevant for the purposes of a s. 105 application even though the Official Assignee and the petitioner did not object to it.

i [4] Even though O. 15 r. 16 of the Rules of the High Court 1980 provides the Court with specific powers to make binding declarations of right, it was refused as the affidavits filed make it obvious that the declaration sought was for a purpose extraneous to that of the bankruptcy and the bankruptcy Court.

[Receiving order and adjudication order rescinded and annulled respectively. Declaration for receiving order and adjudication order to be null and void refused.]

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Cases referred to:

Russian Commercial & Industrial Bank v. British Bank for Foreign Trade. [1921] 2 AC 438 (refd)
Datuk Syed Kechik v. Govt. of Malaysia & Anor. [1979] 2 MLJ 101 (refd)

Legislation referred to:

Bankruptcy Act 1967, s. 105(1), (5)
Rules of the High Court 1980, O. 14, O. 15 r. 16

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Other source referred to:

The Supreme Court Practice 1973, para. 15/16/2

For the judgment debtor/applicant - K. Anantham (C.F. Chin with him); M/s. Chin & Co.

For the judgment creditor/petitioner - V.T. Singam (S. Kandasivam with him); M/s. Daim & Gamany

For the Official Assignee - Rodiah bt. Ali; Official Assignee's office

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JUDGMENT

VC George J:

On 2 August 1988 in an action filed in 1986 being Kuala Lumpur High Court Civil Suit No. 23-3546-86 default judgment was at the instance of Mercantile Insurance Sdn. Bhd., entered against Shuaib bin Lazim in the sum of RM450,000 interests and costs.

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A year later on 10 August 1989 as no amount in respect of the judgment had been paid a bankruptcy notice was caused to be issued against Mr. Shuaib requiring him to pay up the judgment amount which with interest had become RM556,150. The notice was served on Mr. Shuaib on 4 October 1989.

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No amount in respect of the notice was paid and on 23 October 1989 the petition herein was presented to the Court and was fixed for hearing on 21 February 1990 on which date when the petition was called for disposal in open Court the judgment debtor was absent. Counsel for the petitioner who was present asked for and obtained the usual receiving order and an order for adjudication and the judgment debtor Mr. Shuaib was adjudged a bankrupt. This was followed by an order on the application of the representative of the Official Assignee (on the ground that the bankrupt resided in Alor Star) directing that further proceedings in respect of the bankrupt were to be transferred to the High Court at Alor Star.

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It is relevant to pause here to note that one Michael Low Koon Chuan was a co-defendant in the said Suit 23-3546-86 and that against him an O. 14 application judgment had been entered in respect of the same RM450,000 with interests and costs.

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On 21 February 1990, he was also adjudged bankrupt. He had also not turned up when the petition against him was called.

Now, on 12 March 1990 Mr. Shuaib was nominated as a candidate for the Pantai Merdeka by-election in respect of a Kedah State Assembly seat. Undischarged bankrupts are not eligible to offer themselves as candidates for such an election and apparently it is a precondition that the candidates declare that they are not undischarged bankrupts. Mr. Shuaib had made such a declaration. Apparently on nomination day, after nominations had closed, a representative of the candidate standing against Mr. Shuaib had raised an objection to his candidature on the grounds that he was an undischarged bankrupt.

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- a** On 15 March 1990, Mr. Shuaib took out a motion the notice of which is encl. (14) in the file seeking a declaration that the receiving order made on 21 February 1990 and the adjudication of himself as a bankrupt be deemed null and void and for the said order to be rescinded and annulled respectively on the grounds that he "... Ought not to have been adjudged a bankrupt as agreement for settlement as to the liability had already been concluded before the said 21 February 1990 ...". The election was to be held on 24 March 1990 and out of deference to the
- b** obvious urgency of the matter I directed that the motion be heard on the 15th itself. However the papers were not in order. The matter was adjourned for what was not in order to be put right. This included having the time to serve the notice of motion abridged and for having the order that had been made transferring further proceedings to the High Court at Alor Star vacated, all of which having been achieved the notice of motion encl. (14) was recalled for disposal on the 16th.
- c** The thrust of the bankrupt applicant's case was that on 19 February 1990 as a result of the satisfactory conclusion of negotiations (between Michael Low Koon Chuan on behalf of himself and Shuaib and one Ong Lay Ghee representing the judgment creditor/petitioner) for a settlement of the judgment debts of both Michael Low and Shuaib, a settlement was arrived and that because of that the petitioner was to have had the petition scheduled to be heard two days later withdrawn. Michael Low's affidavit which is encl. (14) in 29-9271-89 was with
- d** the consent of the Court read. Paragraphs 3 and 4 of that affidavit were as follows:
3. On 19 February 1990 two (2) days prior to the date fixed for the hearing of the said creditor's petition, I was negotiating with the petitioning creditor's chief executive officer, Mr. Ong Lay Ghee, on my behalf as well as on behalf of my partner Shuaib bin Lazim, and have arrived at an amicable settlement to pay the sum of RM300,000 as full and final settlement.
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4. By reason of the said proposed settlement the petitioning creditor undertook to instruct their said solicitors, M/s. Daim & Gamany of the said proposed settlement and further to request their said solicitors to withdraw the said creditor's petition by consent.
- f** Shuaib (and Michael Low) say that relying on that undertaking they did not attend the bankruptcy Court when the petitions against them were called on 21 March 1990 and as has been seen at the hearing Counsel for the petitioner sought and obtained receiving orders and orders adjudicating Shuaib (and Michael Low) bankrupt. Both Shuaib and Michael Low say by their affidavits that this had happened "through the inadvertence of the petitioning creditor in failing to inform their said solicitors of the said settlement ..."
- g** Ong Lay Ghee affirmed an affidavit on 16 March 1990 which was filed by M/s. P.G. Lim & Co. who held themselves out in an endorsement to the affidavit as being solicitors for the judgment creditor/petitioner. In Court Mr. Sivam a partner of M/s. P.G. Lim & Co. clarified the matter. He said that his firm had filed it on behalf of the M/s. Daim & Gamany who at all relevant times were in fact the solicitors on the record for the judgment creditor. The clarification did not condescend into explaining the oddity of this - of one Kuala Lumpur firm of solicitors filing papers on behalf of another. Ong's affidavit was read. In para. 4 he
- h** says:
4. ... I confirm that on 19 February 1990 Mr. Michael Low had seen me and we had arrived at an amicable settlement. The sum of RM300,000 was offered and it was accepted in full and final settlement of the debt. I agreed to withdraw the creditors petition. I accordingly informed my manager on 20 February 1990 to instruct our solicitors to withdraw the creditors petition.
- i** 5. Unfortunately my manager failed to inform our solicitors.

Where it is clear that the debtor ought not to have been adjudged bankrupt but had been so adjudged (which does happen from time to time in bankruptcy proceedings), what normally happens is that a motion pursuant to s. 105 usually filed by the petitioner himself, is moved, and normally is not opposed, whereupon the orders sought, which as per the said s. 105(1) and (5) are for annulment of the adjudication and rescission of the receiving order, are made as a matter of course.

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In the instant case, the motion was brought by the bankrupt and was not opposed. Mr. V.T. Singham of Counsel for the petitioner informed the Court that the petitioner had no objection to the orders sought. Neither had the Official Assignee.

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However, as has been seen, the motion sought not only orders jurisdiction to grant which are given by ss. 105(1) and (5) but also a declaration that the orders made were to be deemed null and void.

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Order 15 r. 16 of the Rules of High Court provides the Court with specific powers to make binding declarations of right. It is a discretionary power - *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade* [1921] 2 AC 438.

The jurisdiction is unlimited save only the Court's discretion - *Datuk Syed Kechik v. Government of Malaysia & Anor.* [1979] 2 MLJ 101 at 107. The approach the English Courts have taken in the exercise of the discretion in this context is discussed in the White Book - see *The Supreme Court Practice 1973* para. 15/16/2. *Inter alia* it is pointed out that where specific relief other than a declaration is not claimed the jurisdiction should be exercised with great caution. It has been held that a declaration ought not to be made upon a preliminary point in an action brought for that purpose where the substantive relief must be claimed in another action, e.g. the QBD should not make a declaration as to the terms of redemption since an action for redemption should be brought in the Chancery Division - see *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade (supra)*.

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Another aspect of the jurisdiction is that it in effect seeks the opinion of the Court on the alleged right. Accordingly the lack of objection on the part of other parties to the proceedings or even their consent to the orders sought are of no relevance. If the Court is of the opinion that the applicant is entitled to the right and it would not be unlawful or unconstitutional or inequitable for the Court to grant it and that in the context that the applicant seeks the relief, it is relevant that he be granted it, the Court would normally exercise its powers in favour of the applicant.

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In the instant case the motion is brought within the bankruptcy proceedings and is expressly held out to be (in an endorsement in its title) an invocation of s. 105 of the Bankruptcy Act of 1967 and the substantial relief sought, as has been seen, is for the rescission and annulment of the receiving order and the order adjudicating the applicant bankrupt respectively made on 21 February 1990. Section 105 that gives the Court the power to make the orders sought also provides that such power should be exercised where the Court is satisfied that the debtor ought not to have been adjudged bankrupt. Since a declaration of right is not needed to make such orders of rescission and annulment prescribed by s. 105, in the context, there is no call for the Court to declare the rights of the debtor as sought in prayer (i) of the motion or at all. Whether the receiving order and the adjudication of the debtor as bankrupt were null and void is not relevant for the purposes of a s. 105 application.

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Since the declaration sought is not needed for a s. 105 application the Court ought to be cautious as to the *bona fides* of the application. The affidavits filed make it obvious that the declaration sought is for a purpose extraneous to that of the bankruptcy and the bankruptcy

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- a** Court. It is obviously an attempt to seek an answer to the challenge to the validity of Mr. Shuaib's candidature at the by-election at Pantai Merdeka that Mr. Shuaib refers to in his affidavit in support of the motion. That, in my judgment, is something that Mr. Shuaib has to seek elsewhere - not in the commercial division of the High Court in Kuala Lumpur - not in the bankruptcy Court and accordingly I should refuse prayer (i). Further and in any event in the face of the disclosures contained in the affidavit of Mr. S.T. Gamany encl. (20) in the file I would in any event have refused to give the declaration sought by prayer (i).
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- Going by the Gamany affidavit what appears to have transpired is that Mr. Shuaib and Mr. Michael Low had made an offer to settle the judgment debt by their letter to the plaintiff dated 15 February 1989. There had not been any reply to that letter. On 21 February 1990 the two judgment debtors wrote their letter Exhibit AG4 to the Gamany affidavit from which it is to be noted that they had a meeting with Mr. Ong on 20 February 1990 which resulted in their said letter of 21 February 1990. By the letter they made their offer to settle the debt by each of them paying RM150,000 in certain instalments. The writers of the letter enclosed therein the 1st instalment of the offered amount and emphasised that the offer is subject to acceptance. The contents of the letter are inconsistent with the averment that agreement had been "concluded" on 19 February 1990. The copy of this letter was sent by the petitioner to M/s. Daim & Gamany with their letter of 7 March 1990. Reading that letter together with M/s. Daim & Gamany's letter to their client of 23 February 1990, *per se* it seems clear beyond all reasonable doubt *inter alia* that there was no settlement on or before 21 February 1990, that the petitioners were not dismayed by the news that the two debtors had been adjudged bankrupt, that the solicitors cannot have been instructed to withdraw the petition, that as late as 7 March 1990 the petitioners were still considering whether to accept the offer, and that the advice sought by the petitioner's letter of 7 March 1990 and given by Daim & Gamany's letter of 9 March 1990 are in respect of whether the offer was to be accepted and if accepted whether the receiving order and the adjudication could thereafter, on the basis of such acceptance, be set aside. In the face of all that to expect the Court to give an opinion that the orders of 21 February 1990 were null and void was expecting too much to say the least. Prayer (i) was refused even though the Official Assignee and the petitioner were not objecting to it.
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In respect of prayer (ii) I took the line that since the opinion of the Court was not sought on the probative value of the assertions and since the petitioner and the Official Assignee were not opposing the application the orders made had to be rescinded and annulled respectively.

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Also found at [1992] 4 CLJ 2066

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